Supreme Court, U.S.
FILED
AUG 9 1993
OFFICE OF THE CLERK

(1)

93-209
NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILLIAM C. BLANKSTYN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM C. BLANKSTYN*
16213 South 35th Street
Phoenix, Arizona 85044
(602) 759-9024

*Petitioner, In Propria Persona

32 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner was entitled to injunctive relief under Internal Revenue Code (IRC), §§6213(a) and 7421 after a Notice of Deficiency was issued under IRC, §6212(a) and was properly deposited in the United States Mail by the Internal Revenue Service (IRS), but was mishandled by the United States Postal Service resulting in the Petitioner's non-receipt of the Notice?

2. Whether Rule 65(a)(2), Federal Rules of Civil Procedure (FRCP), requires the district Court to give notice to the parties before it advances the trial on the merits and consolidates it with the hearing on preliminary injunction?

THE PARTIES

The only parties are those who appear in the caption of the case.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

THE PARTIES ii

TABLE OF AUTHORITIES v

STATUTES AND REGULATIONS vi

MISCELLANEOUS vi

OPINION OF THE COURT BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE AND FACTS 5

ARGUMENT 14

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT WITH RESPECT TO THE DENIAL OF THE PERMANENT INJUNCTION IS IN CONFLICT WITH THE DECISIONS OF SEVERAL OTHER UNITED STATES COURTS OF APPEAL AND IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT 14

II. THE FAILURE OF THE DISTRICT COURT TO GIVE NOTICE TO THE PARTIES BEFORE IT ADVANCED THE TRIAL ON THE MERITS AND CONSOLIDATED IT WITH THE HEARING ON THE PRELIMINARY INJUNCTION, UNDER THE PROVISIONS OF RULE 65(a)(2), FRCP, IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT 19

CONCLUSION 23

TABLE OF AUTHORITIES

CITATION	PAGE
ABRAHAM ZION CORP. v. LEBOW, 761 F.2d 93, 101 (2nd Cir., 1985)	22
AIR LINE PILOTS' ASS'N, INTERN. v. ALASKA AIRLINES, INC., 898 F.2d 1393 (9th Cir., 1989)	21, 22
COMMISSIONER OF INTERNAL REVENUE v. POWELL, 121 L.Ed.2d 359, 113 S.Ct. 440 (1992)	18
GELLMAN v. STATE OF MARYLAND, 538 F.2d 603 (4th Cir., 1975) . .	21
KEADO v. UNITED STATES, 853 F.2d 1209 (5th Cir., 1984) . .	15
McPARTLIN v. UNITED STATES, 653 F.2d 1185 (7th Cir., (1981)	15, 18
MULVANIA v. COMMISSIONER, 81 TC 65 (1983)	16
PENN v. SAN JUAN HOSPITAL, 528 F.2d 1181 (10th Cir., 1975) .	21
POWELL v. C.I.R., 958 F.2d 53 (4th Cir., 1992) .	15, 18
PYO v. COMMISSIONER, 83 TC 626 (1984)	16
UNIVERSITY OF TEXAS v. CAMENISCH, 451 US 390, 68 L.Ed.2d 175, 101 S.Ct. 1830 (1981) . .	20, 21

STATUTES AND REGULATIONS

SECTION	PAGE
28 USC, §1254(1)	3
IRC §6851	4
IRC §6861	4
IRC, §6212(a)	i, 3
IRC, §6213(a)	i, 3, 4, 11, 14
IRC, §7421	i, 3, 4

MISCELLANEOUS

CITATION	PAGE
Rule 40(a), Federal Rules of Appellate Procedure	2
Rule 65(a)(2), Federal Rules of Civil Procedure	i, 3, 13, 19

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILLIAM C. BLANKSTYN

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, William C. Blankstyn, hereby Petitions this Court for its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on February 22, 1993.

OPINION OF THE COURT BELOW

Both the opinion of the Ninth Circuit Court of Appeals and the United States District Court in Arizona were unpublished opinions and are included in the separate Appendix filed with this petition.

JURISDICTION

On February 22, 1993, the Court of Appeals for the Ninth Circuit entered its judgment (Appendix A) affirming in part and reversing in part the judgment of the United States District Court for the District of Arizona (Appendix C).

On March 5, 1993, the Petitioner filed a Petition for Rehearing within the time permitted by Rule 40(a), Federal Rules of Appellate Procedure (FRAP).[1] The Court

---

1/ **Rule 40. Petition for Rehearing.**
(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. (in part)

denied the Petition on May 12, 1993. The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is invoked under the provisions of 28 USC, §1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutes, regulations and rules involved, are IRC, §§6212(a), 6213 and 7421(a) and Rule 65(a)(2), FRCP, and are stated below.

Sec. 6212. Notice of Deficiency.

(a) In general.

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43 or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

Sec. 6213. Restrictions applicable to deficiencies; petition to Tax Court

(a) Time for filing petition and restriction on assessment

"Within 90 days...after a Notice of Deficiency authorized under Section 6212 is mailed...the taxpayer may file a petition with the United States Tax Court for a redetermination of the deficiency.

Except as otherwise provided in Section 6851 or 6861, no assessment of a deficiency in respect of any tax..., and no levy or proceeding in Court for its collection shall be made, until such notice has been mailed,... nor until the expiration of the 90-day... period... Notwithstanding the provision of Section 7421(a), the making of an assessment or the beginning of such proceedings or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court including the Tax Court." (in part)

Sec. 7421. Prohibition of suit to restrain assessment or collection.

(a) Tax.

Except as provided in sections 6212(a) (c), 6213(a), 6672(b), 6694(c), and 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

Rule 65. Injunctions.

(a) Preliminary Injunction.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a

> preliminary injunction, the court may order the trial on the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be construed and applied as to save to the parties any rights they may have to trial by jury.

STATEMENT OF THE CASE AND FACTS

On or about January 2, 1990, the Petitioner received two (2) Notices of Proposed Adjustment (30-day letter) which made proposed adjustments in income taxes due for the years 1985 and 1986. On or about April 20, 1990, the Petitioner received what purported to be a Notice of Deficiency, issued by the Director of the Ogden Service Center in the name of the Commissioner of Internal Revenue Service, dated March 26, 1990. The Notice was only for the year 1986. The Petitioner timely

filed a Petition to the United States Tax Court with respect to the 1986 Notice of Deficiency. The Petitioner did not receive the Notice of Deficiency for the year 1985.

On March 23, 1990, the Petitioner wrote to one Marc Garcia[2] and asked him if the Notice of Deficiency for the year 1985 was going to issue and if the Notice had issued why hadn't the Petitioner received it. The Petitioner received no response to this letter. On December 23, 1990, the Petitioner, via a request under the Freedom of Information Act (FOIA), requested a copy of his Examination Administration File and other documents for the year 1985.

On or about January 7, 1991, the Petitioner received a Final Notice and Demand (Notice of Intent to Levy) from the Ogden Service Center for taxes that were

---

2/ Marc Garcia was identified as the person to contact with respect to both 30-day letters and the 1986 Notice of Deficiency.

alleged to have been assessed for the year 1985. On or about January 10, 1991, the Petitioner wrote to Mr. Robert Wenzel, Director, Ogden Service Center and informed him that the Petitioner had not received the Notice of Deficiency for the year 1985.

On January 23, 1991, the Petitioner received a partial response to his FOIA request. The disclosure officer denied the request for the Examination Administration File because 1985 was involved in a law enforcement proceeding in the United States Tax Court. The Petitioner appealed the denial of the records on February 26, 1991.

On or about February 14, 1991 a Notice of Levy on Wages Salary and other income [Form 668-W(C)] was sent from the Automated Collection Branch of the Internal Revenue Service in Denver, Colorado to KPNX Broadcasting Company. KPNX did not inform the Petitioner of the Notice of Levy until

March 5, 1991 as the Notice had been sent to the wrong address.

On March 13, 1991, the Petitioner telephoned Automated Collection in Denver. He discussed the matter with a Mrs. Sexton. She suggested that the Petitioner go to the local Phoenix District Office and discuss the problem with someone there. On March 15, 1991, the Petitioner went to the Phoenix Office and talked with a Mel Stewart. He showed Mr. Stewart the correspondence, the FOIA and the response to the request.

Mr. Stewart contacted Ogden and told the Petitioner that the Notice of Deficiency had issued and that it was in the "Audit File." Mr. Stewart told the Petitioner, that because he had allegedly failed to file his returns for 1989 and 1990, that neither he nor the Collections Department would take any action to remove the Notice of Levy that had been served upon KPNX.

On March 18, 1991, the Petitioner discussed the matter with Mark Ashby, Assistant United States Attorney, District of Arizona. Mr. Ashby suggested that the Petitioner discuss the matter with the Assistant District Counsel that was handling the Petition to the United States Tax Court for the 1986 Notice of Deficiency.

On March 19 and 20, 1991, the Petitioner called and talked with Mr. Andrew J. Horning in the district Counsel's Office. He told the Petitioner to bring copies of all of the documents and he would see what he could do. On March 21, 1991, the Petitioner took the documents to Mr. Horning under a cover letter which outlined the matter for him. The letter also informed him that if he would not have the IRS voluntarily restrain themselves from Levying upon the Petitioner's property, by 9:00 AM, March 22, 1991, an action seeking a permanent injunction would be filed

accompanied by an application for a temporary restraining order.

On March 22, 1991, the Petitioner again called Assistant United States Attorney, Mark Ashby. He was referred to Assistant United States Attorney Janet Patterson as Mr. Ashby was out of town. The Petitioner told Ms. Patterson that district Counsel would not have the IRS voluntarily restrain themselves. The Petitioner also gave her verbal notice that he would seek a Temporary Restraining Order without further Notice to the United States Attorney's Office.

Later that same day, the Petitioner again called Mr. Horning. Mr. Horning told the Petitioner that the envelope, with the 1985 Notice of Deficiency still in it, had been found. The envelope was unopened and had been returned by the Postal Service marked "unclaimed." Mr. Horning told the Petitioner that his problem was with the Postal Service and not the IRS.

On March 25, 1991, the Petitioner filed his complaint in the United States District Court for the District of Arizona seeking a temporary restraining order, a preliminary injunction and a permanent injunction to enjoin the Respondent from levying on the Petitioner's property to collect taxes alleged to have been assessed for 1985. The Petitioner also sought damages for the unauthorized disclosure of return and return information, in violation of IRC, §7431. [3]

The Petitioner invoked the jurisdiction of the district Court pursuant to the provisions of 28 USC, §§1331, 1340 and 1346 and IRC, §§6213(a) and 7431.

On March 26, 1991, the district Court denied the Petitioner's application for the Temporary Restraining Order, and set a hearing on the Petitioner's Motion for a

---

3/ The unauthorized disclosure claims a not a part of this petition as the Court of Appeals reversed the district Court's dismissal of those claims and remanded back for further proceedings.

Preliminary Injunction. On April 19, 1991, the hearing was held.

At the hearing, the testimony of the Respondent's witnesses and the evidence showed that the Notice of Deficiency for the year 1985 had been mailed but was returned to the IRS by the Postal Service marked "unclaimed." The Petitioner's uncontroverted testimony (See Appendix E), showed that even though he had received the Notice of Deficiency for the year 1986, the Postal Records showed that the Notice for 1986 had been returned "unclaimed."

After the hearing the district Court granted the Petitioner's Motion for the preliminary injunction. The Court further ordered the Parties to submit supplemental memoranda on whether the Petitioner could have filed a petition to Tax Court, without actual knowledge of the existence of or the possession of the 1985 Notice, in light of his receipt of the 1986 Notice, where delay

in the delivery of the 1985 Notice was not the fault of the Petitioner.

On April 22, 1991, the Parties submitted their supplemental memoranda. On April 30, 1991, the Court entered its final judgment, vacated the preliminary injunction and dismissed the action. In its Order, the Court stated that it was advancing the trial on the merits and consolidating it with the hearing on the preliminary injunction under the provisions of Rule 65(a)(2), FRCP. No previous notice had been given.

On May 14, 1991, the Petitioner filed a Motion for a New Trial or in the Alternative a Motion to Alter or Amend the Judgment. On July 24, 1991, the Court denied the Motion.

On September 18, 1991, the Petitioner filed his Notice of Appeal. On February 22, 1993, the Court of Appeals rendered its judgment affirming the district Court's dismissal of the injunction claims and reversing the district Court's dismissal of

the unauthorized disclosure claims and remanded the action for further proceedings.

ARGUMENT

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT WITH RESPECT TO THE DENIAL OF THE PERMANENT INJUNCTION IS IN CONFLICT WITH THE DECISIONS OF SEVERAL OTHER UNITED STATES COURTS OF APPEAL AND IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

The Appellate Court found that the Petitioner was not entitled to injunctive relief under the provisions of IRC, §6213(a) because the evidence showed that Internal Revenue Service properly mailed the Notice of Deficiency. The Appellate Court's decision failed to consider the Petitioner's uncontroverted testimony that tended to indicate that the Petitioner's non-receipt of the Notice was caused by circumstances beyond the control of the Petitioner.

The testimony tended to show that it was the Postal Service that mishandled the 1985 Notice, resulting in Petitioner's non-

receipt. The testimony showed that even though he did receive the Notice of Deficiency for 1986, which had been mailed on the same date[4] as the 1985 Notice, Postal Service records showed that the 1986 Notice had also been returned "unclaimed", the same condition the Postal Service claimed in the return of the 1985 Notice.

In failing to consider this uncontroverted testimony the Appellate Court ignored decisions from other circuits that had held that "[w]hen evidence indicates that a notice of deficiency has not been received by the taxpayers due to error of the Postal Service the notice shall be found to be insufficient. POWELL v. C.I.R., 958 F.2d 53, 58 (4th Cir., 1992); McPARTLIN v. UNITED STATES, 653 F.2d 1185, 1191 (7th Cir., (1981). See also KEADO v. UNITED STATES, 853 F.2d 1209, 1212 n.9 (5th Cir., 1984) (Claim of non-receipt of Notice of

---

4/ March 26, 1990.

Deficiency by Keado's may have been considered had they filed a Petition to Tax Court within 90 days after becoming aware of the Notice of Deficiency).

Even the Tax Court has found that notice is insufficient when evidence shows that non-receipt of the Notice was the result of Postal Service error. PYO v. COMMISSIONER, 83 TC 626, 639 (1984); MULVANIA v. COMMISSIONER, 81 TC 65, 70 (1983) ["If mailing ***does not*** result in **actual** notice of a tax deficiency, because 'the notice is sent to the wrong address and never delivered, ***or delivered with prejudicial delay***, **the statutory purpose is not served** and it would be **manifestly unfair** to deny the taxpayer his prepayment hearing.'" (emphasis added)]. The Petitioner submits that his uncontroverted testimony shows that the non-receipt of the Notice was caused by the Postal Service and that the 90-day period to Petition the

United States Tax Court did not begin, if it were to begin to run at all until he actually received the notice.[5]

At no time did the district Court or the appellate Court address the Petitioners' uncontroverted testimony or otherwise attempt to distinguish the above cited authorities from the circumstances of this case. The appellate Court refused to acknowledge that the Petitioner's non-

---

5/ The Petitioner first received the Notice of Deficiency for 1985 on April 13, 1991. It was attached as an exhibit in the United States' response to the Motion for Preliminary Injunction filed by the Petitioner in the district Court. The Petitioner filed a Petition with the United States Tax Court on July 10, 1991. It was dismissed on January 31, 1992. The Petitioner subsequently appealed to the Ninth Circuit Court of Appeals which affirmed the dismissal on March 19, 1993. The Petition for Rehearing was denied on June 4, 1993. Petition for a Writ of Certiorari in that action must be filed with this Court no later than September 2, 1993. Once it is filed and both this and the other Petition are docketed, the Petitioner will move this Court to consolidate them.

receipt of the Notice of Deficiency was beyond the control of the Petitioner.

In POWELL, supra, the Commissioner Petitioned this Court for a Writ of Certiorari. Despite the Commissioner's ***dire warning*** that the Fourth Circuit's ruling would "seriously impede the ability of the United States to collect taxes from the vast numbers of taxpayers who change their places of residence..." this Court denied certiorari to the Commissioner on November 2, 1992. See COMMISSIONER OF INTERNAL REVENUE v. POWELL, 121 L.Ed.2d 359, 113 S.Ct. 440 (1992). As a result of the Ninth Circuit's judgment in this case it has placed itself in conflict with POWELL, and McPARTLIN, supra, and the Tax Court.

Accordingly, and for the foregoing reasons, this Court should grant the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals.

II. THE FAILURE OF THE DISTRICT COURT TO GIVE NOTICE TO THE PARTIES BEFORE IT ADVANCED THE TRIAL ON THE MERITS AND CONSOLIDATED IT WITH THE HEARING ON THE PRELIMINARY INJUNCTION, UNDER THE PROVISIONS OF RULE 65(a)(2), FRCP IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT

The Court of Appeals declined to decide this issue because of its disposition of the case. (See Appendix A, Footnote 2). In its April 30, 1991 Order (See Appendix C), the district Court indicated for the first time that it was going to advance the trial on the merits and consolidate it with the hearing on the preliminary injunction. The Court gave neither oral nor written notice to the parties before it advanced and consolidated.

The Petitioner raised the issue of lack of notice in his Motion for New Trial or in the Alternative Motion to Alter or Amend Judgment. It was this Motion that the Court of Appeals declined to decide, thus, avoiding altogether the issue of the

district Court's failure to give Notice before it advanced and consolidated.[6]

The Appellate Court's refusal to address the district Court's lack of notice, before it advanced and consolidated, left the Court in conflict with this Court in UNIVERSITY OF TEXAS v. CAMENISCH, 451 US 390, 395, 68 L.Ed.2d 175, 101 S.Ct. 1830

6/ Despite the fact that the Appellate Court declined to discuss the Motion for New Trial, in coming to it's conclusions concerning the unauthorized disclosure claims, the Appellate Court found that the 23C (Summary Record of Assessment) by itself was insufficient to prove the validity of the assessment. The presentation of the 23C as evidence and the need for further discovery was raised in the Motion for a New Trial. Although the issues were fully briefed in Arguments III and IV of in the Appeals Brief, the source of the evidence and issues arose from the Rule 59(e), FRCP, Motion filed in the district Court. The Petitioner submits that Appellate Court should have consider the merits of the 59(e) Motion, once it began using evidence presented with it. By refusing to address the 59(e) Motion the Appellate Court avoided the Motion's full ramifications concerning the district Court's advancement and consolidation without notice.

(1981). The Ninth Circuit's decision was likewise in conflict with other Appellate Court's wherein the lack of notice raised serious questions of constitutional due process. GELLMAN v. STATE OF MARYLAND, 538 F.2d 603 (4th Cir., 1975); PENN v. SAN JUAN HOSPITAL, 528 F.2d 1181 (10th Cir., 1975).

Furthermore, the Ninth Circuit's decision in this case left it in conflict with itself in AIR LINE PILOTS' ASS'N, INTERN. v. ALASKA AIRLINES, INC., 898 F.2d 1393, 1397 (9th Cir., 1989) holding that this Court's opinion in CAMENISCH, was controlling for the notice requirement.[7] In AIR LINE PILOTS', the lack of Notice, before

---

7/ It is important to note that there was no dispute from the Parties that the district Court had the discretion to advance and consolidate. The dispute arose concerning the Court's requirement to give notice before it exercised the discretion to advance and consolidate. The district Court's refusal to give notice and the Appellate Court's refusal to decide the issue is in conflict with the decisions of this Court.

advancement and consolidation, was at issue and was part of the basis for the Ninth Circuit's remand back to the district Court. The Respondent refused to show how AIR LINE PILOTS' was distinguishable from this case in both district Court of the Appellate Court. The district Court likewise declined to distinguish the case in its order denying the Motion for New Trial (Appendix D). The Appellate Court simply refused to render any opinion at all on the issue as raised.

The purpose of the notice is to afford all parties of the opportunity to present all of the evidence before the Court rules on the merits, which includes affording the Parties an opportunity to engage in discovery in aid of the presentation of evidence. ABRAHAM ZION CORP. v. LEBOW, 761 F.2d 93, 101 (2nd Cir., 1985); AIR LINE PILOTS', supra, at 1397-98.

If this Court is unable to reach a conclusion for the issue raised in ***Argument***

I because the record does not reflect sufficient testimony and evidence to show that it was Postal Service error in the delivery of the 1985 Notice of Deficiency this Court should return this action to the lower Courts due to lack of Notice before the district Court advanced and consolidated. The Notice that should have been given by the district Court, would have provided the Petitioner the opportunity to inform the Court that he needed more time for discovery to marshall the necessary evidence to support Argument I above.

Accordingly, and for the foregoing reasons, this Court should grant the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals.

CONCLUSION

As a result of Postal Service error the Petitioner did not receive the Notice of Deficiency for the year 1985. The Notice was returned to the IRS, by the Postal

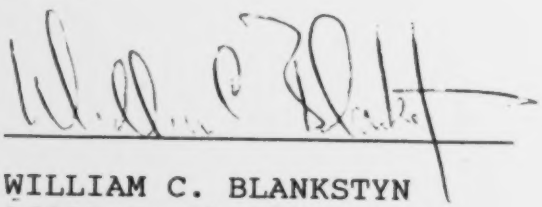
Service, marked "unclaimed." The evidence showed that despite the fact that the Petitioner received the 1986 Notice of Deficiency, which was mailed the same day as the 1985 Notice of Deficiency, the Postal Records for the 1986 Notice of Deficiency also showed that it had been sent back to the IRS "unclaimed."

The Petitioner brought an action for injunctive relief because he did not receive the 1985 Notice. The district Court granted the Petitioner's Motion for Preliminary Injunction. When it subsequently dismissed the action, the district Court advanced the trial on the merits and consolidated it with the hearing on the preliminary injunction, without notice to the parties. The Court of Appeals refused to even address the issue of Notice on appeal due to its disposition of the injunction claims. The Notice would have afforded the Petitioner the opportunity to inform the Court that further discovery

was necessary, should it be found that the record is insufficient to show that the Postal Service erred in mailing the Notice of Deficiency.

Accordingly, and for the foregoing reasons, this Court should grant the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED this 5th day of August, 1993.



WILLIAM C. BLANKSTYN
16213 South 35th Street
Phoenix, Arizona 85044
(602) 759-9024
Petitioner, In Propria Persona

Supreme Court, U.S.
FILED
AUG 3 1993
OFFICE OF THE CLERK

93-209 (2)

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILLIAM C. BLANKSTYN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SEPARATE APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM C. BLANKSTYN*
16213 South 35th Street
Phoenix, Arizona 85044
(602) 759-9024

*Petitioner, In Propria Persona

3 9 PP

TABLE OF CONTENTS

SUBJECT	APPENDIX
APPENDIX A - APPELLATE COURT MEMORANDUM AFFIRMING IN PART, VACATING IN PART AND REMANDING	1
APPENDIX B - APPELLATE COURT ORDER DENYING PETITION FOR REHEARING	13
APPENDIX C - DISTRICT COURT ORDER DENYING INJUNCTION AND DISMISSING ACTION	15
APPENDIX D - DISTRICT COURT ORDER DENYING MOTION FOR NEW TRIAL	27
APPENDIX E - EXCERPTS OF TRANSCRIPT OF TESTIMONY OF WILLIAM C. BLANKSTYN AT HEARING ON MOTION FOR PRELIMINARY INJUNCTION	31

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

A P P E N D I X A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM C. BLANKSTYN,	)	No. 91-16625
	)	
	)	D.C. No. CV-91-00452-CAM
Plaintiff-Appellant	)	
	)	
v.	)	
	)	
UNITED STATES,	)	MEMORANDUM *
	)	
Defendant-Appellee.	)	
	)	

Appeal from the United States
District Court for the
District of Arizona
C.A. Muecke, District Judge,
-Presiding

Submitted February 11, 1993 **

Before: GOODWIN, SCHROEDER, and CANBY, Circuit Judges.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, we deny Blankstyn's request for oral argument.

William C. Blankstyn appeals pro se the district court's dismissal of his action seeking injunctive relief and damages in connection with the Internal Revenue Service's (IRS) levy on his wages to collect taxes assessed against Blankstyn for tax year 1985. Blankstyn also appeals the district court's denial of his Fed. R. Civ. P. 59(e) motion. We have jurisdiction pursuant to 28 U.S.C. §1291. We affirm in part, vacate in part and remand.

I. BACKGROUND

Blankstyn filed a complaint in district court seeking to enjoin the IRS from levying on his wages and seeking damages for wrongful disclosure of return information. Blankstyn alleged that he never received a notice of deficiency for tax year 1985, and that the assessment was not properly made and recorded. Blankstyn alleged that the IRS's collection of taxes assessed for 1985 was therefore unlawful. Blankstyn sought a

temporary restraining order, preliminary injunction, and permanent injunction to prevent IRS from levying on his wages to collect the 1985 tax assessment. Blankstyn also alleged that because the assessment was procedurally improper, the IRS's disclosure of return information in connection with the wage levy violated 26 U.S.C. §7431. Blankstyn sought damages for wrongful disclosure of return information and an injunction to prevent further wrongful disclosures.

On April 19, 1991, the district court held a hearing on plaintiff's request for a preliminary injunction. At the conclusion of the hearing, the district court issued a preliminary injunction effective for 10 days and ordered supplemental briefing. On April 30, 1991, the district court issued an order (1) consolidating the motion for preliminary injunction with the trial on the merits, (2) treating the motion for preliminary injunction as a motion for permanent injunction,

(3) denying the injunction, (4) granting judgment for the United States, and (5) dismissing the action.

II. Injunction

The district court found that Blankstyn claim for injunctive relief was barred by the Anti-Injunction Act ("Act"), 26 U.S.C. §7421(a). The Act prohibits a taxpayer from bringing a "suit for the purpose of restraining the assessment or collection of any tax ...." Id. The Act is strictly enforced. See Maxfield v. United States Postal Serv., 752 F.2d 433, 434 (9th Cir. 1984); see also Bob Jones Univ. v. Simon, 416 U.S. 725, 736-37 (1974). Thus, ordinarily taxpayers are limited in district court "to suits for refund." United States v. Condo, 782 F.,2d 1502, 1506 (9th Cir. 1986).

There are several statutory exceptions and one judicial exception to the Act. See 26 U.S.C. §§6212(a), (c), 6213(a), 6672(b),

6694(c), 7426(a),(b)(1), 7429(b); Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962). Under the judicial exception announced in Enochs, injunctive relief is available if the taxpayer can demonstrate that (1) under no circumstances could the government prevail, and (2) the taxpayer will be irreparably harmed in the injunction is not granted. Id.; see also Condo, 782 F.2d at 1506.

Blankstyn contends that he never received a notice of deficiency for tax year 1985 prior to the assessment and levy, and, therefore, his claim for injunctive relief was permitted by section 6213. This contention lacks merit.

Section 6213 provides that no assessment of a tax shall be made and no proceeding for collection shall begin until 90 days after the mailing of a notice of deficiency pursuant to section 6212. Section 6213 further provides: "[n]otwithstanding the

provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

A notice of deficiency is valid if it is mailed to the taxpayer's last known address, even if it is never received by the taxpayer. Williams v. Commissioner, 935 F.2d 1066, 1067 (9th Cir. 1991); King v. Commissioner, 857 F.2d 676, 679 (9th Cir. 1988); Cool Fuel, Inc. v. Connett, 685 F.2d 309, 312 (9th Cir. 1982). A postal form certifying that a notice of deficiency has been mailed is sufficient, in the absence of contrary evidence, to establish that the notice was properly mailed. United States v. Zolla, 724 F.2d 808, 810 (9th Cir.) cert. denied, 469 U.S. 830 (1984).

Here, the IRS alleged that it properly mailed Blankstyn a notice of deficiency for tax year 1985. To support this claim, the

IRS submitted (1) a copy of Blankstyn's notice of deficiency for tax year 1985, dated March 26, 1990 and properly addressed to Blankstyn at his last known address, (2) the certified mailing list of notices of deficiency sent by the Ogden Service Center on March 26, 1990 (Form 3624), which listed the certified mail number for Blankstyn's notice, and (3) a copy of the envelope in which the notice was mailed, returned marked "unclaimed" by the post office. Given this evidence, the district court correctly found that the IRS had established that it had properly mailed the notice of deficiency to Blankstyn. See Williams, 935 F.2d at 1067; Zolla, 724 F.2d at 810. Further, the district court correctly found that Blankstyn's claim for injunctive relief under section 6213 was precluded because the notice was properly mailed, regardless of whether Blankstyn ever received it. See Cool Fuel, 685 F.2d at 312.

Blankstyn also contends that he is entitled to injunctive relief under the judicial exception to the Act. This contention lacks merit. Blankstyn failed to establish that under no circumstances could the government prevail. See Enochs, 370 U.S. at 7. Further, Blankstyn has an adequate remedy at law because he can pay the tax and file an action for refund. See 26 U.S.C. §7422. Finally, the district court correctly found that Blankstyn would not suffer irreparable harm without an injunction. See Enochs, 370 U.S. at 7; Elias v. Connett, 908 F.2d 521, 526 (9th Cir. 1990) (financial hardship does not constitute irreparable harm).

III. Wrongful Disclosure

Blankstyn contends the district court erred by consolidating the trial on the merits of his wrongful disclosure claim with the preliminary injunction hearing and dismissing his wrongful disclosure claim.

This contention has merit.

Section 6103 provides that income tax returns and return information are confidential. 26 U.S.C. §6103; Maisano v. United States, 908 F.2d 408, 410 (9th Cir. 1990). Section 7431 provides a taxpayer a civil cause of action for damages for the intentional or negligent disclosure of confidential return information by officers or employees of the United States. 26 U.S.C. §7431(a); Maisano, 908 F.2d at 410. Section 6103, however, authorizes the IRS to disclose return information if necessary for the collection of a tax liability. 26 U.S.C. §6103(k)(6); see Maisano, 908 F.2d at 410.

Here, Blankstyn alleged that because he did not receive a notice of deficiency and because the assessment was not properly recorded, the underlying assessment and lien were invalid and, therefore, the release of return information was unlawful. The dis-

trict court correctly concluded that the IRS had established that the notice of deficiency was properly mailed and, therefore, that this allegation could not support a wrongful disclosure claim. Nevertheless, the district court failed to address Blankstyn's argument that no assessment was ever made. See 26 U.S.C. § 6203. The only evidence in the record regarding the assessment was a copy of the Summary Record of Assessment, which did not identify Blankstyn or the assessment made against him. Thus, the district court erred by dismissing Blankstyn's wrongful disclosure claim after the preliminary injunction hearing. [1] See Hughes v. United States, 953 F.2d 531, 542 (9th Cir. 1992); Maisano, 908 F.2d at 410. Accordingly, we remand to the district court

---

1/ Nevertheless, for the reasons discussed in section II above, Blankstyn was not entitled to injunctive relief on this claim.

for further consideration of this claim. [2]

AFFIRMED in part, VACATED in part and REMANDED.

2/ Given our disposition of this appeal, we need not consider whether the district court erred by denying Blankstyn's Rule 59(e) motion.

Page Left Blank

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM C. BLANKSTYN,	)	No. 91-16625
	)	
Plaintiff-Appellant	)	D.C. No. CIV 91-00452-CAM
	)	
v.	)	Arizona (Phoenix)
	)	
UNITED STATES OF AMERICA	)	ORDER
	)	
Defendant-Appellee.	)	
	)	

Before: GOODWIN, SCHROEDER, and CANBY, Circuit Judges.

Appellant's motion to consolidate is denied. Appellant's petition for rehearing is denied.

Page Left Blank

A P P E N D I X C

In the United States District Court

For the District of Arizona

WILLIAM C. BLANKSTYN Plaintiff vs. UNITED STATES Defendant	)	No. CIV 91-452 PHX CAM ORDER

Having hear the evidence and considered the parties briefs and supplemental briefs concerning Plaintiff's Motion for Preliminary Injunction, the court concludes as follows:

The court heard the evidence presented by the parties. -Therefore, pursuant to R. 65(a)(2), FRCP, this court will order the trial of the action on the merits to be advanced and consolidated with the hearing of the application of preliminary injunction.

FACTUAL BACKGROUND

Plaintiff is challenging a tax assessment for 1985. The IRS is attempting to collect a deficiency allegedly owed by Plaintiff for 1985. Plaintiff claims that the IRS did not properly notice the deficiency and therefore cannot collect. IRS has levied on Plaintiff's wages. Plaintiff alleges that this activity violates 26 U.S.C. §7431 which provides for privacy in return filings.

Plaintiff alleges that had the deficiency been properly noticed he would have filed an appropriate action in the Tax Court. Plaintiff received his 1986 notice and petitioned the Tax Court within the requisite period. He wrote to the IRS and requested information concerning his 1986 notice. The IRS failed to respond to his letter. This, he states, deprives him of his procedural due process rights.

Plaintiff is seeking injunctive relief

to prohibit the IRS from collecting the amounts in violation of the Deficiency Notice requirements and to stop the IRS from disclosing protected information.

The court makes the following findings of fact:

(1) Plaintiff did not receive his 1985 deficiency notice.

(2) The IRS mailed the Notice to Plaintiff.

(3) Plaintiff was aware of the 1985 notice because he requested information concerning the notice. Furthermore, he received the 1986 notice.

(4) The IRS did not respond to Plaintiff's request.

DISCUSSION

Sovereign Immunity

Defendant United States claims that they are protected by the doctrine of sovereign immunity. They argue that the jurisdictional statutes cited by Plaintiff do not provide waiver of sovereign immunity and the

government has not consented to suit. Particularly, Plaintiff cites 26 U.S.C. §§6213 and 7431 which provide for jurisdiction in the federal courts against the United States.[1] Therefore, the sovereign immunity defense fails.

Anti-Injunction Statute

Defendants claim that the Anti-Injunction Statute at 26 U.S.C. §7421 bars relief requested by Plaintiff. The statute specifically excludes §6213(a) from its scope. [2]

---

[1] § 6213 provides in relevant part that "Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such a proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court."
§ 7431 the civil damage section provides in relevant part that "such taxpayer may bring a civil action for damages against the United States in a district court of the United States."

[2] 26 U.S.C. §7421 provides in relevant part the following:
(a) Tax.--Except as provided in sections 6212(a) and (c), 6213(a), 7762(b), 6694(c), and 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person,

By its language, the statute does not act as a bar to the instant action.

The Injunction

The criteria for an injunction are as follows: (1) irreparable harm, and (2) inadequate remedy at law.[3] The Ninth Circuit uses two tests. Under the Sierra Club test the moving party must show (1) that s/he will suffer irreparable injury if injunctive relief is not granted, (2) probability of success on the merits, (3) in balancing the equities, will the nonmoving party be harmed more by the injunction than the moving party will be helped, (4) that the injunction is in the public interest.[4] The second test provides that the moving party must demonstrate either (1) a

---

whether or not such person is the person against whom such tax was assessed.

[3] Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-07, 79 S.Ct. 948 (1959).

[4] Sierra Club v. Hickel, 433 F.2d 24, 33 (9th Cir. 1970) aff'd 405 U.S. 727 (1972).

combination of probable success on the merits and the possibility of irreparable injury or (2) that a serious question exists and the balance of hardships tips sharply in his or her favor.[5]

a. Irreparable Harm

The court was presented with Plaintiffs pay stub. The IRS is levying nearly 2/3 of Plaintiff's earnings. However, the court was not presented with the formula by which the IRS determines levy amounts and therefore cannot make a determination of irreparable harm on that basis. Furthermore, the court notes that Plaintiff's lifestyle may be excessive considering his alleged tax debt.[6] Therefore, Plaintiff has failed to show irreparable harm pursuant to Jensen v.

---

[5] William Inglis & Sons Baking Co. v. ITT Continental Banking Co., 526 F.2d 86 (9th Cir. 1975).

[6] The court opines that rent of $1,200.00 may be excessive in light of the circumstances.

Internal Revenue Service, 835 F.2d 196 (9th Cir. 1987).

b. Probable Success on the Merits

The court finds that Plaintiff did not receive the Deficiency Notice for 1985 but that the IRS mailed it to his last known address. 26 U.S.C. §6212 authorizes the Secretary to send a deficiency notice by certified mail or registered mail. Notice is required before the Service can begin assessment, collection, etc. U.S. v. Zolla, 724 F.2d 808, cert. denied 105 S.Ct. 116, 469 US 830, reh'g denied 105 S.Ct. 550, 469 US 1067 (9th Cir., 1984). Receipt by the taxpayer is not actually required provided the Notice was sent by certified or registered mail. See e.g., U.S. v. Eisenhardt, 437 F.Supp. 247 (D.Md 1977); Wilson v. Commissioner of Internal Revenue, 564 F.2d 1317, 1319 (9th Cir. 1977); DeWelles v. United States, 378 F.2d 37, 39 (9th Cir. 1967); Cohen v. United States, 297

F.2d 760, 775 (9th Cir. 1962). Morse v. Internal Revenue Service, 635 F.2d 701 (8th Cir. 1980) (Failure to receive did not deny due process). Furthermore, the third circuit has held that failure of the Postal Service to deliver the Notice does not render the notice inadequate. Berger v. C.I.R., 404 F.2d 668 (3rd Cir. 1968), cert. denied, 89 S.Ct. 1744, 395 US 905.

The District Court in Kansas reasoned that "if the IRS had to follow up every unsuccessful mailing to a taxpayer's last know address with further efforts to reach him, the 'obviously impossible' administrative burden that Section 6212(b) and its predecessors were designed to eliminate, see H.R. Rep. No. 2, 70th Cong., 1st Sess., at 22; S.Rep.No.960, 70th Cong., 1st Sess. at 30 would be reimposed, and well-established case law to the effect that Section 6212(b) does not require actual receipt of deficiency notices, [citations

omitted] would be rendered meaningless." Trails End Motels, Inc. v. C.I.R., 532 F.Supp. 85,89 (D.Kan. 1982).

The law is clear that mailing by certified or registered mail is all that is required of the IRS to affect notice.

Would the Tax Court have accepted his petition without Plaintiff Notice of Deficiency? The law is clear that the basis for the Tax Court's jurisdiction is a properly issued Notice of Deficiency. See Richard A. Zaun, 62 T.C. 278 (1974) (in that case the court found that jurisdiction was proper because the petitioner had notice of the deficiency event though he had not received the notice). 26 U.S.C. §6213(a) and Rule 13, Tax Court Rules of Procedure.

However, Plaintiff attached to his supplemental brief a copy of the instructions to file in the tax court. In two places, the instructions remind the petitioner to attach a copy of the Notice of

Deficiency. It is possible from this instruction, any petitioner would thank that he or she need a copy of the Notice of Deficiency to file.

This court finds that Plaintiff received proper notice of the 1985 deficiency. Plaintiff received his 1986 Notice and was expecting the 1985 notice. He inquired by letter concerning the notice which evidences his awareness of the 1985 notice. Although he did not receive a response, he could have filed his petition with the Tax Court. If the notice had not been issued by the IRS the Tax Court would have dismissed the petition for lack of jurisdiction. However, had petitioner filed, the Tax Court would have searched the records and found the Notice of Deficiency and jurisdiction would have been proper.

Based on this finding the court will not order injunctive relief prohibiting further levy of Plaintiff wages.

Money Damages

Plaintiff also seeks money damages under §7431. The court will not award money damages. Money damage awards are appropriate upon a knowing or negligent wrongful disclosure by the IRS. The court finds no such disclosure in this matter.

Plaintiff has a remedy by paying the tax and suing for a refund. Plaintiff could have filed in the Tax Court and stopped the levy. He let that deadline pass even though he was aware of the Deficiency.

For those reasons and the reasons stated by Defendant in its brief and at oral argument IT IS THEREFORE ORDERED THAT:

(1) This hearing for application for preliminary injunction is consolidated and advanced with the trial on the merits treating the motions for preliminary injunctive relief as motions for permanent injunctive relief.

(2) Plaintiff's Motion for Preliminary

Injunction (Doc. 2) is DENIED.

(3) Plaintiff's request for Damages pursuant to 26 U.S.C. §7431 is DENIED.

(4) Plaintiff's Motion for Temporary Restraining Order (Doc.#3-1) is DENIED.

(5) Plaintiff's Motion for Order to Show Cause (Doc.#3-2) is DENIED.

(6) The Clerk of Court shall enter judgment accordingly.

Dated this 30 day of April, 1991.

C.A. Muecke
U.S. District Judge

A P P E N D I X D

In the United States District Court

For the District of Arizona

WILLIAM C. BLANKSTYN Plaintiff vs. UNITED STATES Defendant	)	No. CIV 91-452 PHX CAM ORDER

Having considered the parties' briefs concerning Plaintiff's Motion for a New Trial or in the Alternative Motion to Alter or Amend Judgment, the Court concludes as follows:

On April 30, 1991, this court denied Plaintiff's request for preliminary injunction and dismissed Plaintiff's action against the United States for improper Notice of Deficiency and improper Disclosure of Return Information. At that time, the court deemed the hearing for preliminary injunction as a trial on the merits.

Plaintiff argues that the court's action deeming the preliminary injunction hearing a trial on the merits was improper pursuant to University of Texas v. Camenisch, 451 U.S. 390, 101 S.Ct. 1830 (1981). In dicta in the Camenisch case, the Supreme Court stated that courts have commonly required that the parties receive notice of the court's intent to consolidate the trial and preliminary injunction hearing either before the hearing or at a time which still affords the parties the opportunity to present their cases. Camenisch, 451 U.S. at 395, 101 S.Ct. at 1834. The Ninth Circuit subsequently cited this language in Michenfelder v. Sumner, 860 F.2d 328 (9th Cir. 1988), holding that adequate notice depends on facts of the case and that the district court's broad discretion to consolidate will not be overturned "absent a showing of substantial prejudice in the sense that a party was not allowed to

at 337. The Ninth Circuit further indicated that it has upheld cases in which the district court did not give any notice when the complaining party failed to show how additional evidence could have altered the outcome of the case. Id.

In this case, Plaintiff asserts two additional pieces of evidence not presented at the hearing -- (1) the IRS assessment record and (2) the formula by which IRS determines levy amounts. Neither piece of evidence would change the court's finding that the IRS properly sent notice to Plaintiff. Even if Plaintiff were allowed to present this evidence, the evidence would not alter the outcome of this case. Thus, Plaintiff's argument that he failed to receive adequate notice of consolidation is without merit.

IT IS THEREFORE ORDERED THAT:

(1) Plaintiff's Motion for New Trial (Doc 16-1) is DENIED.

16-1) is DENIED.

(2) Plaintiff's Motion to Alter or Amend Judgment (Doc. 16-2) is DENIED.

(3) The hearing scheduled for August 16, 1991 is VACATED.

Dated this 23 day of July, 1991.

_____

C.A. Muecke
U.S. District Judge

A P P E N D I X E

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

WILLIAM C. BLANKSTYN	)	
	)	
Plaintiff,	)	CIV 91-452
	)	PHX CAM
	)	
v.	)	April 19, 1991
	)	Phoenix, Arizona
UNITED STATES OF AMERICA,	)	
	)	
Defendant	)	
	)	

MOTION FOR PRELIMINARY INJUNCTION

BEFORE THE HONORABLE CARL A. MUECKE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	William C. Blankstyn In Propria Persona 16213 South 35th Street Phoenix, Arizona 85044
For the Defendant:	United States Attorney By: Richard G. Patrick 230 North First Avenue Phoenix, Arizona 85025
Court Reporter:	Jean M. Moll, RPR 230 North First Avenue Phoenix, Arizona 85025

Computer Aided Transcription

INDEX

WINTESS	PAGE
JACK GUISINGER	
Direct Examination by Mr. Patrick	6
Cross Examiniation by Mr. Blankstyn	24
PATRICIA PRISTOS	
Direct Examination by Mr. Patrick	25
Cross Examiniation by Mr. Blankstyn	40
WILLIAM C. BLANKSTYN	
Direct Examination by Mr. Blankstyn	45
Cross Examiniation by Mr. Patrick	58
JOHN WILDE	
Direct Examination by Mr. Blankstyn	72

EXHIBITS

NUMBER		ADMITTED
3	Postal Service Record	23
4	Notice of Deficiency 1985	31
4-A	Envelope	42
6	Photograph	48
7	Photograph	48
8	Notice of Deficiency	58
9	Letter	58
10	Letter	58
11	Letter	58
12	Letter	58
13	Petition	59

does not go to my address, it can go to [1] anybody's address on the odd side.

THE COURT: Well, I know they don't have a Zip Code for every individual in the United States. That's absurd. They have a Zip Code for an area. I don't understand your point.

I don't think anybody would ever contend that everybody has an individual Zip Code. The Zip Code is to give the postman an idea of what area in the country and what area within that state and what area within that community that mail is supposed to go to.

MR. BLANKSTYN: I just wanted to establish a foundation that the Zip plus 4 number does not go to my particular address. It could go to any --

---

1 Page numbering at top of page is the same page numbering found in original transcript by Court Reporter Jean M. Moll.

THE COURT: This is true of everybody. Go ahead. But then they have the address which goes to your address.

MR. BLANKSTYN: I also have a letter, because I made a telephone inquiry to the Claims Department of the Postal Service, that not only shows that the 1985 deficiency with the certified number that ends in 456 went back unclaimed, but that the one which was the '86 deficiency, the one that I picked up and did receive and is now in Tax Court, also went back unclaimed. So the Post Office really has no idea of where this mail went, what happened to it. It was mishandled. That's what my contention is.

Supreme Court, U.S.
FILED
OCT - 8 1993
OFFICE OF THE CLERK

No. 93-209

In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM C. BLANKSTYN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
MICHAEL L. PAUP
Acting Assistant Attorney General
GILBERT S. ROTHENBERG
DAVID ENGLISH CARMACK
JOY L. PRITTS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a notice of deficiency mailed by the Internal Revenue Service to the taxpayer's last known address pursuant to Section 6212 of the Internal Revenue Code, 26 U.S.C. 6212, but not received by the taxpayer due to Postal Service error, is sufficient to permit the assessment of taxes.

2. Whether the trial court's failure to give advance notice of its consolidation of the trial on the merits with the preliminary injunction proceeding constitutes reversible error when the taxpayer cannot demonstrate that he was prejudiced by the lack of notice.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Abraham Zion Corp. v. *Lebow*, 761 F.2d 93 (2d Cir. 1985)	8
Air Line Pilots Ass'n, Int'l v. *Alaska Airlines, Inc.*, 898 F.2d 1393 (9th Cir. 1990)	8
Balkissoon v. *Commissioner*, 995 F.2d 525 (4th Cir. 1993)	6, 7
Berger v. *Commissioner*, 404 F.2d 668 (3d Cir. 1968), cert. denied, 395 U.S. 905 (1969)	5
Berry v. *Bean*, 796 F.2d 713 (4th Cir. 1986)	8
Bright v. *Nunn*, 448 F.2d 245 (6th Cir. 1971)	8
Commissioner v. *Skapiro*, 424 U.S. 614 (1976)	4
Drummond v. *Fulton County Dep't of Family & Children's Services*, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978)	7
Elias v. *Connett*, 908 F.2d 521 (9th Cir. 1990)	4
Gellman v. *Maryland*, 538 F.2d 603 (4th Cir. 1976)	9
Holly Sugar Corp. v. *Goshen County Coop. Beet Growers Ass'n*, 725 F.2d 564 (10th Cir. 1984)	7
Jones v. *United States*, 889 F.2d 1448 (5th Cir. 1989)	6
Keado v. *United States*, 853 F.2d 1209 (5th Cir. 1988)	5, 6
McPartlin v. *Commissioner*, 653 F.2d 1185 (7th Cir. 1981)	5, 6
Michenfelder v. *Sumner*, 860 F.2d 328 (9th Cir. 1988)	8
Morse v. *IRS*, 635 F.2d 701 (8th Cir. 1980)	5

Cases—Continued:

	Page
Penn v. *San Juan Hospital, Inc.*, 528 F.2d 1181 (10th Cir. 1975)	8
Powell v. *Commissioner*, 958 F.2d 53 (4th Cir.), cert. denied, 113 S. Ct. 440 (1992)	5, 6
Rappaport v. *United States*, 583 F.2d 298 (7th Cir. 1978)	5
Reese Publishing Co. v. *Hampton Int'l Communications, Inc.*, 620 F.2d 7 (2d Cir. 1980)	7
Standard Oil Co. v. *Lopeno Gas Co.*, 240 F.2d 504 (5th Cir. 1957)	8
University of Texas v. *Camenisch*, 451 U.S. 390 (1981)	7
Williams v. *Commissioner*, 935 F.2d 1066 (9th Cir. 1991)	5

Statutes and rule:

Internal Revenue Code (26 U.S.C.):	
26 U.S.C. 6212	3, 4, 6
26 U.S.C. 6212(a)	4
26 U.S.C. 6212(b)(1)	3, 5, 6-7
26 U.S.C. 6213	2, 3, 4, 7
26 U.S.C. 6213(a)	2, 4
26 U.S.C. 7421(a)	2, 4
26 U.S.C. 7431	2, 7
Fed. R. Civ. P.:	
Rule 65	8, 9
Rule 65(a)(2)	7, 8

Miscellaneous:

11 C. Wright & A. Miller, *Federal Practice and Procedure* (1973)	7

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-209

WILLIAM C. BLANKSTYN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is unpublished, but the decision is noted at 988 F.2d 117 (Table). The order entered by the district court (Pet. App. 15-26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1993. The petition for rehearing was denied on May 12, 1993 (Pet. App. 13). The petition for a writ of certiorari was filed on August 9, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 26, 1990, the Internal Revenue Service (IRS) mailed petitioner a notice of deficiency for his 1985 income taxes. The notice advised petitioner that, since he had failed to file a return, the IRS had computed his tax liability for that year (Pet. App. 7). The notice was mailed by certified mail to petitioner's correct address. Petitioner did not receive the notice, however, and it was returned to the IRS as "unclaimed" (*id.* at 7, 17, 21).

The IRS thereafter sent a Final Notice and Demand (Notice of Intent to Levy) to petitioner informing him that an assessment had been made against him for his 1985 taxes and that, if he did not pay the assessed taxes, the IRS could levy upon his property. Following petitioner's failure to pay the assessment, the IRS levied on his wages (Pet. App. 16).

2. Petitioner filed a complaint in district court seeking an injunction to prohibit the IRS from levying on his property to collect his unpaid taxes. Section 6213 of the Internal Revenue Code provides a limited exception to the Anti-Injunction Act (26 U.S.C. 7421(a)) that permits a taxpayer to maintain a suit to enjoin the collection of taxes when a notice of deficiency has not been "mailed" to the taxpayer. 26 U.S.C. 6213(a).

Petitioner also sought damages pursuant to Section 7431 of the Code for an "unauthorized disclosure" of his tax return information. See 26 U.S.C. 7431. He claimed that the assessment of his taxes was procedurally improper (on the theory that the assessment was not filed in the Service's records) and that the disclosure of his return information in connection with the levy on his wages was therefore unauthorized (Pet. App. 3).

At a hearing on petitioner's request for a preliminary injunction, the government argued that the IRS had properly "mailed" the notice of deficiency and that the

exception to the Anti-Injunction Act provided in Section 6213 of the Code therefore did not apply (Pet. App. 6-7, 18-19). Upon completion of the hearing, the court issued a preliminary injunction effective for ten days and ordered supplemental briefing (Pet. App. 3). After the supplemental memoranda were filed, the court entered an order (i) consolidating and advancing the trial on the merits with the hearing on petitioner's request for preliminary injunction, (ii) treating the motion for preliminary injunction as a motion for permanent injunction, (iii) denying the injunction because it was barred by the Anti-Injunction Act, (iv) granting judgment for the United States, and (v) dismissing the action (Pet. App. 15, 25-26).

3. On appeal, petitioner contended that the notice of deficiency was invalid because he had not received it due to a purported error by the Postal Service. Petitioner claimed that his request for injunctive relief was therefore within the statutory exception to the Anti-Injunction Act contained in Section 6213 of the Code. The court of appeals rejected that assertion. The court found that petitioner's claim for injunctive relief was barred because the notice of deficiency was properly "mailed," even if petitioner did not receive it (Pet. App. 7). The court noted that a notice of deficiency is valid under Section 6212 if it is "mailed to the taxpayer at his last known address" (26 U.S.C. 6212(b)(1)), even if it is never received by the taxpayer (Pet. App. 7). The court further held that petitioner was not entitled to injunctive relief under the judicial exception to the Anti-Injunction Act because (i) he failed to establish that "under no circumstances could the government prevail" and (ii) he has an adequate remedy at law since "he can pay the tax and file an action for refund" (Pet. App. 8).

The court concluded, however, that the district court had erred in dismissing petitioner's wrongful disclosure claim. The court therefore remanded the case to the dis-

trict court for further consideration of that claim (Pet. App. 8-11). The court reasoned that an issue of fact remained to be resolved as to whether the assessment was properly recorded and whether "the underlying assessment and lien were invalid and, therefore, the release of return information was unlawful" (*id.* at 9).

ARGUMENT

1. a. The Anti-Injunction Act prohibits a taxpayer from bringing a "suit for the purpose of restraining the assessment or collection of any tax" (26 U.S.C. 7421(a)). Section 6213 of the Code, however, provides a limited exception to the Anti-Injunction Act and allows a taxpayer to maintain an action to enjoin the collection of tax when a notice of deficiency has not been "mailed" to the taxpayer pursuant to Section 6212. See 26 U.S.C. 6213(a).[1] See *Commissioner* v. *Shapiro*, 424 U.S. 614, 616-617 (1976); *Elias* v. *Connett*, 908 F.2d 521, 523 (9th Cir. 1990). Section 6212 of the Code provides that a notice of deficiency may be sent to a taxpayer "by certified mail or registered mail." 26 U.S.C. 6212(a). To provide a uniform and predictable method for issuing these notices, Congress further specified in Section 6212 that a notice,

[1] Section 6213 provides in relevant part as follows (26 U.S.C. 6213(a)):

> Within 90 days * * * after the notice of deficiency authorized in section 6212 is mailed * * * the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. * * * [N]o assessment of a deficiency in respect of any [income tax] * * * and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer * * *. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court.

"if mailed to the taxpayer at his last known address, shall be sufficient" (26 U.S.C. 6212(b)(1)).

Applying the plain language of this statute, the courts of appeals have generally held that a notice of deficiency properly mailed to the taxpayer's last known address by certified or registered mail is valid without regard to whether the taxpayer actually received it. *Williams* v. *Commissioner*, 935 F.2d 1066, 1067 (9th Cir. 1991); *Keado* v. *United States*, 853 F.2d 1209, 1212 (5th Cir. 1988); *Morse* v. *IRS*, 635 F.2d 701, 703 (8th Cir. 1980); *Rappaport* v. *United States*, 583 F.2d 298, 301 (7th Cir. 1978). See also *Berger* v. *Commissioner*, 404 F.2d 668, 673 (3d Cir. 1968), cert. denied, 395 U.S. 905 (1969). Applying this authority, the court of appeals properly rejected petitioner's claim in this case. The uncontroverted evidence demonstrated that the IRS mailed the notice of deficiency to petitioner by certified mail, properly addressed to his last known, and correct, address (Pet. App. 6-7).

b. Petitioner asserts (Pet. 14-15) that he did not receive the notice of deficiency because it was mishandled by the Postal Service.[2] He claims that, under decisions in other circuits, the notice of deficiency was therefore invalid. Pet. 15, citing *Powell* v. *Commissioner*, 958 F.2d 53 (4th Cir. 1992), cert. denied, 113 S. Ct. 440 (1992), and *McPartlin* v. *Commissioner*, 653 F.2d 1185 (7th Cir. 1981).

In *McPartlin*, the court stated that "[w]hen evidence indicates that a notice of deficiency has not been received by the taxpayer due to error of the Postal Service, the notice shall be found insufficient." 653 F.2d at 1191. As other courts have recognized, however, that statement was dictum because the court concluded in *McPartlin* that the IRS had *not* sent the notice of deficiency to the

[2] The district court, however, made no such finding.

taxpayer's "last known address" as required by Section 6212 (653 F.2d at 1187, 1190). See *Keado* v. *United States*, 853 F.2d at 1212 n.9. As we acknowledged in the government's petition for a writ of certiorari in the *Powell* case (92-452 Pet. at 11 n.12), the decision in *McPartlin* thus does not afford a basis for concluding that a conflict among the circuits exists on this issue.

It is true that the Fourth Circuit stated in *Powell* v. *Commissioner* that if "the notice was admittedly not delivered to the taxpayers because of an error of the Postal Service * * * that is sufficient proof on the part of the taxpayers * * * that the notice was insufficient." 958 F.2d at 56. It is no longer clear, however, that *Powell* is accepted as a correct statement of the law in that circuit. In *Balkissoon* v. *Commissioner*, 995 F.2d 525 (1993), the Fourth Circuit endorsed the generally accepted rule that a notice of deficiency is "sufficient" if it is mailed to the taxpayer's last known address (*id.* at 528):

> Section 6212(a) does not require that the taxpayer actually receive the notice of deficiency. Instead, the Commissioner must show only that it sent a notice by registered or certified mail to the taxpayer's last known address.

The court emphasized that this "statutory scheme . . . provides a method of notification which insures that the vast majority of taxpayers will be informed that a tax deficiency has been determined against them without imposing on the Commissioner the virtually impossible task of proving that the notice actually has been received by the taxpayer." *Ibid.*, quoting *Jones* v. *United States*, 889 F.2d 1448, 1450 (5th Cir. 1989). Even though *Powell* was cited to the court in the *Balkissoon* case (see 995 F.2d at 528), the Fourth Circuit applied the generally accepted rule that a notice of deficiency is sufficient if it is "mailed to the taxpayer at his last known address" (26

U.S.C. 6212(b)(1)) even if the taxpayer did not "actually receive" it. 995 F.2d at 528.

2. Petitioner contends (Pet. 19-22) that the district court erred by failing to give advance notice of the consolidation of the trial on the merits with the preliminary injunction proceeding.[3] Rule 65(a)(2) of the Federal Rules of Civil Procedure specifically provides, however, that, "[*b*]*efore or after the commencement of the hearing* of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." Fed. R. Civ. P. 65(a)(2) (emphasis added). The Rule thus authorizes the trial court, on its own motion, to transform a preliminary injunction hearing into a final hearing on the merits of the claim at any time. 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2950, at 486 (1973). See *Holly Sugar Corp.* v. *Goshen County Coop. Beet Growers Ass'n*, 725 F.2d 564 (10th Cir. 1984); *Reese Publishing Co.* v. *Hampton Int'l Communications, Inc.*, 620 F.2d 7 (2d Cir. 1980); *Drummond* v. *Fulton County Dep't of Family & Children's Services*, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978).

Although "courts have commonly required" that advance notice be given of a consolidation of the trial on the merits with the preliminary injunction proceeding (*University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981)), neither this Court nor the courts of appeals have held that such advance notice is required in every instance. Instead, advance notice of consolidation under

[3] Petitioner's complaint sought both injunctive relief under Section 6213 and damages for an "unauthorized disclosure" under Section 7431. The court of appeals remanded the case for further consideration of petitioner's damage action under Section 7431. The consolidation issue addressed in this part of the petition concerns only petitioner's request for a permanent injunction.

Rule 65(a)(2) is required only when failure to do so would prejudice one of the parties by precluding that party from presenting evidence that could have changed the outcome of the case.[4] See *Michenfelder* v. *Sumner*, 860 F.2d 328, 337 (9th Cir. 1988) (party not prejudiced by lack of notice where he could not show that additional evidence could have altered the outcome of the case); *Berry* v. *Bean*, 796 F.2d 713, 719 (4th Cir. 1986) (dismissal on merits without advance notice of consolidation appropriate where plaintiffs could not offer any evidence that would change the outcome of the case); *Abraham Zion Corp.* v. *Lebow*, 761 F.2d 93, 101 (2d Cir. 1985) (the district court's "order of consolidation will not be overturned on appeal absent a showing of substantial prejudice in the sense that a party was not allowed to present material evidence"). See also *Bright* v. *Nunn*, 448 F.2d 245, 247 n.1 (6th Cir. 1971) (dismissal on merits at end of preliminary injunction hearing permissible where plaintiff shows no right to relief); *Standard Oil Co.* v. *Lopeno Gas Co.*, 240 F.2d 504, 510 (5th Cir. 1957).

The cases relied upon by petitioner are not to the contrary. In those decisions, the courts determined that the aggrieved party was prejudiced because he could have adduced additional material evidence. See *Air Line Pilots Ass'n, Int'l* v. *Alaska Airlines, Inc.*, 898 F.2d 1393 (9th Cir. 1990) (consolidation and determination on merits under Rule 65 was improper where factual issues required further discovery); *Penn* v. *San Juan Hospital, Inc.*, 528 F.2d 1181 (10th Cir. 1975) (dismissal of a claim for permanent injunction without consolidation and notice was improper because plaintiffs had additional

---

[4] Petitioner appears to concede that this is the proper standard, for he requests further review of this issue only in the event the Court were to determine that Postal Service error would defeat an otherwise proper notice of deficiency. See Pet. 22-23.

material evidence that was not presented at the preliminary injunction hearing); *Gellman* v. *Maryland*, 538 F.2d 603 (4th Cir. 1976) (consolidation under Rule 65 without notice was an abuse of discretion where it appeared that additional evidence may have been relevant to the cause of action). The decisions of the lower courts in this case do not conflict with these legal principles.

Petitioner asserts that advance notice was required in this case so that he could present additional evidence that he did not receive the notice of deficiency because of Postal Service mishandling (Pet. 22-23). As the court of appeals properly determined, however, the sufficiency of a notice of deficiency is determined solely by whether the IRS properly sent the notice to the taxpayer's last known address (Pet. App. 7). The underlying reasons for petitioner's failure to receive the notice, after it was properly mailed by the IRS, are therefore not relevant to his claim for injunctive relief. Because petitioner's claim was properly disposed of on these legal grounds, he can establish no prejudice from the consolidation of the case under Rule 65 without prior notice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MICHAEL L. PAUP
Acting Assistant Attorney General

GILBERT S. ROTHENBERG
DAVID ENGLISH CARMACK
JOY L. PRITTS
Attorneys

OCTOBER 1993